

IN THE  
Supreme Court of the United States.

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OCTOBER TERM, 1917.

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BYRON S. WAITE, ISRAEL F. FISCHER, AND HENDERSON M. SOMERVILLE, AS GENERAL APPRAISERS DESIGNATED BY THE SECRETARY OF THE TREASURY IN THE BOARD OF TAX APPEALS, APPELLANTS.

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP, T. RIDGWAY MACY AND IRVING K. HALL, DOING BUSINESS AS CO-BROTHERS UNDER THE NAME OF CARTER, MACY & COMPANY.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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BRIEF FOR THE APPELLEES.

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**No. 255.**

**Supreme Court of the United States,**

OCTOBER TERM, 1917.

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BYRON S. WAITE, ISRAEL F. FISCHER, and HENDERSON M. SOMERVILLE, as General Appraisers, Designated by the Secretary of the Treasury as the Board of Tea Appeals, Appellants,

v.

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP, T. RIDGWAY MACY, and IRVING K. HALL, doing Business as Copartners under the Name of Carter, Macy & Company.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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**BRIEF FOR THE APPELLEES.**

**Statement.**

This is an appeal by the respondents from a decision of the United States Circuit Court of Appeals for the Second Circuit which reversed a decree of the United States District Court, dated August 15, 1914, dismissing the bill of complaint.

## Facts.

The complainants (appellees) are importers of tea. The respondents (appellants) are members of the appellate board created by the Act of Congress of March 2, 1897, Chap. 358, 29 Stat. 604, as amended by Act of May 16, 1908, Chap. 170, 35 Stat. 163 (hereinafter referred to as the Tea Law), to re-examine teas already examined by the tea examiners appointed under the same Act. The function of these examinations and re-examinations is to determine whether or not teas offered for import comply with the requirements imposed by the Tea Law for admission into the United States.

Certain green teas of the complainants were offered by them for import, were rejected by the examiner, and are now before the appellants for re-examination, upon which the appellants' decision will be final and unreviewable in any court.

In re-examining the teas and deciding thereon, appellants threaten to adopt a method of examination, and to apply a criterion for judging the admissibility of the teas, neither of which is authorized by the Tea Law. The object of the suit was to secure an injunction restraining these unauthorized acts; and the decision appealed from grants the injunction asked in regard to the latter of the two matters referred to.

The Tea Law expressly prescribes the criterion by which teas offered for import are to be judged. It also prescribes the method of examination which is to be used, both in the examinations at the port and in the re-examinations by the appellate board. The first section of the Act provides that, to be admissible, teas offered for import must be equal in "purity, quality and fitness for consumption" to certain

standard teas which are annually designated by the Secretary of the Treasury. Quantities of these teas are purchased by the Department and placed in the hands of all examiners (including the appellants) to enable them to make the necessary comparison with teas offered for import. If equal to these standard teas in the three named respects, the proposed import is entitled to entry; otherwise not.

The method of examination is prescribed by section 7 of the Act, which requires that the "purity, quality and fitness for consumption" (of the teas in question) "shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water and, if necessary, chemical analysis."

By section 10 of the Act, the Secretary of the Treasury is given power to enforce the provisions of the Act by appropriate regulations. Assuming to act under this power the Secretary has issued regulations (T. D.'s 31367, 31368 and 33211) which direct all examiners, including of course the appellants, to reject all teas which upon examination prove to contain any coloring matter whatever. These regulations also require (Article 22 of T. D. 33211) that all examiners, likewise including the appellants, examine the teas (to test their purity) by means of the so-called Read test or Read method.

It is our contention that both of these regulations are not only unauthorized by law, but command the examiners to violate the law—indeed to act in exact opposition to its plain mandates. They direct the exclusion of teas which contain microscopic quantities of coloring matter without regard to their other contents, irrespective of whether or not such teas are, in fact, or in the

opinion of the examiners, superior in purity to the standards; and they require the use of a method of examination which is neither a method in accordance with the usages and customs of the tea trade, nor a method of chemical analysis. As these contentions depend on the construction of the Tea Law, it is necessary to state a number of facts in relation to the methods and history of the business governed by that statute.

Green teas are prepared in China at the points where they are grown. The preparation usually takes place in small establishments under the most unclean and unsanitary conditions imaginable (fol. 81). These conditions are such that all green teas contain relatively large quantities of matter which is not tea—foreign matter. In addition, many well known adulterants are from time to time found, such as leaves of other plants, exhausted leaves, imitation leaves, added tannin extract, catechu, as well as considerable quantities of clay, sand and organic filth (fol. 117, 390, 391). In addition to these impurities certain coloring matters, usually Prussian blue, indigo or ultramarine, and facing matters, such as plumbago or the like, are sometimes purposely applied to the leaves to improve their appearance. The coloring matters in question are insoluble and thus incapable of passing into the infusion, which is the only part of the tea which enters the human body (fol. 213). They are also harmless in themselves, in whatever quantity taken (fol. 300, 303). The commonest of them, Prussian blue, is recognized in the United States Pharmacopeia as having a medicinal value (fol. 419). In coloring teas, however, they are used in such minute quantities that even if they were virulent poisons, such as arsenic,

they would be harmless (fol. 214-5). The average intentionally colored tea will perhaps contain one part in 50,000, or 20 parts in 1,000,000, of the coloring matter used (fol. 160). On the other hand, the quantity of foreign matter, other than color, present in the average teas is enormously larger. In the government standards with which the teas in question were to be compared, 100 times as much, or an average of about 2,000 parts in a million, of foreign mineral matter alone were found (fol. 494). These standards are supposed to contain no color whatever, though in fact they do contain quantities which, microscopically speaking, are considerable, but in so finely divided a form as to escape the Read test (fol. 171). It is thus apparent that a standard tea, presumably colorless, may readily contain a quantity of total impurity greater than that present in a proposed import by vastly more than the amount of any possible color which the import might contain. The standard may be full of rubbish, while the import may contain practically no foreign matter other than a trace of color.

Until about 1911 substantially all green teas were and always had been colored to the extent described (fol. 512), and the prevalence of the practice was necessarily known to everyone who had any acquaintance whatever with the business, and to Congress. In spite of that fact, the Tea Law contains no reference to coloring or facing, nor does it contain any provision which makes or justifies any discrimination among the various forms of impurity commonly present in teas. Its sole requirement is that already quoted, that the proposed import shall be equal "in purity" to the standard tea. It protects the public against harm-

ful impurities by the requirement that the import equal the standard in "fitness for consumption".

Of late years the practice of coloring teas, at least for this market, has been largely abandoned (fols. 574-575). The teas, however, owing to the poverty of the Chinese growers, are prepared in the same utensils and on the same floors which were or still are used for preparing colored teas (fol. 118). The work is done in small huts full of the dust of ages (fol. 85). Under these circumstances accidental particles of color find their way into substantially all teas. Color enough to bring about the rejection of teas will often get into them merely from the use, as containers, of tins which have been used before (Appellants' witness Hazen, fol. 570). The amount of coloring matter for which teas are now rejected is so infinitesimally minute—as, for example, in the teas in question in which the complainant's chemist found less than one part in a million—that it cannot well have been intended to color the product, and must have been introduced accidentally. When thus accidentally introduced the coloring matter is, of course, present exclusively or chiefly in the dust, not on the leaf (fols. 527-8), and thus cannot affect or improve the appearance of the product.

The sole method of examining teas known to the customs and usages of the tea trade is what is called the cup test, which consists simply in placing an amount of tea equal in weight to a silver half dime in a clean cup with boiling water and examining the resulting infusion, the drawn leaves, the sediment (if any) in the cup, and the scum (if any) on the surface (fols. 124-6). This method furnishes a practical, though rough, means of determining the purity of teas, and of detecting the

presence of imitation and exhausted leaves, sand and excessive color or facing (fols. 521-2). Until 1911 no other method of examining teas was prescribed by the Treasury regulations or used by the examiners. In that year, however, a Treasury regulation was adopted requiring the use of a chemical analysis. In 1912 by a new regulation (T. D. 32322) this was superseded by the so-called Read test. By this method the dust from two ounces of tea, obtained by rubbing through a sieve of prescribed mesh, is placed upon white paper and rubbed into the paper with a spatula. The loose dust is then blown off and the resulting marks upon the paper are examined with a lens. Under this examination microscopic quantities of coloring matter may be detected, if not too finely divided, and if they are not so applied as to adhere firmly to the leaves. Minute particles of Prussian blue, indigo, or ultramarine which may be present in the dusts will be squeezed and spread by the spatula over the surface of the paper in such a manner as to be visible with the lens, or indeed, sometimes, to the naked eye. When the coloring matter is present in the tea in the form of microscopic particles in the tea-dust the use of this test will condemn teas containing as little as one part in two million of coloring matter (fol. 159). The test will not, however, show how much coloring matter the tea may contain, nor whether it contains more nor less than another tea (fols. 158, 325). It gives no information as to any other impurity (fols. 289, 369); and, as in the case of the Government standards examined by Dr. De Ghuée, which contained 600 particles of coloring matter, but showed nothing under the Read test, it will not show color if present in very finely

divided form, or if firmly applied to the leaves (fol. 171). This test, in a slightly altered form is prescribed by T. D. 33211, comprising the tea regulations for 1913, and applicable to the teas in question.

In making their re-examination the appellants have in all cases followed the regulations issued by the Secretary of the Treasury, and it cannot be disputed that they threaten to do so in re-examining the teas in question. It is expressly admitted by their counsel that they will reject these teas if they are found on examination by the Read method to show any color whatever (fols. 235, 237-8, 284).

This is the threatened conduct which the present suit was brought to restrain. The prayer of the bill is that the appellants be forbidden to obey the Treasury regulations which command that teas, even if found superior in general purity to the standard teas, be rejected if found to contain any color, and the corresponding regulations which require the use of the Read test. It also asks that by mandatory injunction the appellants be commanded to examine the teas in question in the manner required by law, and to apply to those teas the criterion which the statute establishes, and not that which the Treasury regulations prescribe—to determine, that is, whether in their judgment the teas in question are equal to the standards *in purity*, and not merely whether they are equal *in freedom from coloring matter*. We asked the court, not to constrain the judgment of the appellants in their official capacity, or to control their decision, but only to restrain them from carrying out their avowed intention of exercising their judgment under an incorrect construction of the statute, and to direct them to exercise it under a correct one. The

injunction granted leaves the appellants perfectly free to admit or reject the teas in question, and to decide entirely as they see fit the question of fact on which the admissibility turns. It simply construes the law, declares what powers are vested in the appellants and judicially defines the question which they are to decide.

The Read Test, in a form identical with that which the appellants threaten to use as the decisive factor in their examination of the teas, has been condemned as illegal by the tea-board itself. The predecessors of the appellants, acting in obedience to the Treasury regulations, made use, in their re-examinations, of the Read test as originally prescribed by the Treasury Regulations (T. D. 32322). The present complainants thereupon protested, and after a hearing the board decided (T. D.'s 32959 and 33087) that the test was illegal, being neither in accordance with the usages and customs of the tea trade nor a form of chemical analysis. The regulation requiring the test was then altered in an ostensible attempt to bring it within the literal meaning of the extrekest possible definition of the phrase "chemical analysis", and in this altered form was promulgated in the present Treasury regulation T. D. 33211. The new form, however, as we shall show, left the result of an examination dependent on the results of precisely the same process as the old.

The teas in question (referred to in the testimony as Q. U. I. 5, Q. U. I. 6, and Q. U. I. 7) are of the highest possible grade, and cost the complainants four or five times as much as the average value of the corresponding standard teas (fols. 131-4). Their superiority to the standards in quality and fitness for consumption is undisputed. They were rejected solely for impurity and that impurity con-

sisted solely in the presence therein of color. According to the complainants' witness the amount of color present was in no case more than one part in one million (fol. 171). According to the appellants' witness, Dr. Pain (fols. 341-6), the amounts were respectively ten, twelve and nineteen parts in a million; but this was the result of a process containing so many elaborate steps that the possibility of error in dealing with such small quantities was so great as to discredit the conclusion. It is, however, undisputed that the total foreign matter present in these teas was vastly less than that present in the corresponding standard teas. The character of the teas in question is therefore such that they would presumably be rejected if examined in the manner and under the criterion which the appellants propose to use, but would presumably be admitted if examined under what we contend to be the conditions required by law. Our evidence to this effect was offered solely to establish the fact that we are were likely to be injured by the conduct sought to be restrained, and not to establish in such a way as to constrain the decision of the appellants, our right to bring the teas in.

The final rejection of the teas, if it occurs, will occasion to the complainants direct losses impossible to compute, and irreparable damage in the way of loss of contracts, customers, business credit, and reputation. These facts are alleged in paragraphs XII-XVI of the bill, were not questioned at the trial or in the Circuit Court of Appeals, and were apparently conceded, counsel having expressly admitted the facts alleged in paragraph 16 of the bill, a paragraph which stated the sum of the damage which will result "in the several manners herein-before alleged" (fol. 334). It is now for the first

time since the answer, which of course contained a formal denial of irreparable damage, contended that there is no proof of such damage. We believe that the irreparable character of the damage appears inevitably from the whole situation, but will discuss the proof hereinafter.

The learned trial court dismissed the bill substantially on two grounds: (1) that the application was premature, since it assumed that the appellants would commit an illegal act which they might possibly not commit; and (2) that the court lacked jurisdiction, because the statute had committed to appellants the entire question of whether or not proposed imports fulfil the requirements for admission.

The Circuit Court of Appeals reversed this decision, holding in accordance with our contention that though the Tea Law made the appellants the sole judges of the question of fact as to whether the teas in question were equal to the standards in purity, &c., it did not empower them to define their own jurisdiction by conclusively determining the construction of the statute; that the statute, properly construed, required the appellants in comparing the purity of teas offered for import with that of the standard, to take into consideration all forms of impurity, and therefore did not warrant rejection for color only, or for impurity consisting in color, unless the coloring matter plus other impurities made the import below the standard in purity, quality or fitness for consumption. Having thus decided, the court apparently declined to pass upon the propriety of the use of the Read test as the decisive factor in the examination. This was doubtless natural, as the test is obviously useless except for the enforcement of the rule condemned by the court.

**POINT I.****The court had jurisdiction to grant the relief prayed.**

The acts complained of and sought to be enjoined are wholly unauthorized acts, sought to be done by the appellants under color of statutory authority. The appellants and the Secretary of the Treasury have no power to interfere with the complainants' property, in any manner, except as they derive it from statute, and in this instance except as they derive it from the Tea Law. Every power which they seek to exercise must have its basis somewhere within the four corners of that act. The statute gives importers the right to have their teas examined in the prescribed manner, and to have them admitted to import if, when so examined, they fulfil, in the judgment of the examiners, the precise requisites imposed by law. If the appellants base their decision upon an unlawful method of examination, or impose unlawful requisites of admission, they infringe upon the rights given the complainants by the law. Indeed, if any proposed dealing of theirs with complainants' tea is not authorized by that statute, it is a wholly unlawful act. If prejudicial to the complainants, any such unlawful act, if threatened, is necessarily the proper subject of injunction. It is perfectly settled law that the Federal courts may enjoin such acts, and that there is nothing in the official character of the appellants which exempts them from the equity jurisdiction of the court or renders them immune from its injunctive processes.

*Philadelphia Company v. Stimson*, 223 U. S. 605.

*American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94.

The illegality of the proposed acts will be pointed out in detail in subsequent portions of this brief, but for the purpose of discussing the jurisdiction it is sufficient to assume that the acts in question are not authorized by statute. If they are authorized, of course the complainants have no case in any event.

The appellants deny the jurisdiction of the court on the ground that the Tea Law has committed to an administrative tribunal exclusive power to decide all questions determining the admissibility of tea. They hold that in this respect the Tea Law is an example of the type of statute so often considered in immigration cases, particularly in the Chinese Exclusion cases.

It is respectfully submitted, however, that these statutes are widely different from the Tea Law. They do in terms commit to the immigration authorities not only the general administration of the law but also the actual decision of all questions upon which the admissibility of Chinese immigrants can turn, and they make that decision final. They prescribe no method of testing the qualifications of the applicant for admission, and they do in the most unmistakable terms express the intention of Congress to commit to the executive every power in the premises which can be lawfully delegated. For example, the statute under consideration in the *Japanese Immigrant Case*, 189 U. S. 86, provides that

*"All decisions made by the inspection officers or their assistants touching the right of any alien to land when adverse to such right shall be final . . ."* (p. 95).

Such a statute makes the power of the administrative officers extend to the decision, not merely of

**questions of fact, but of all questions touching the right of the person affected in any respect. All the later immigration cases arise under similar acts.**

These statutes are very different from the Tea Law, which contains no provision of this character. It commits to the examiners and appellate board only the decision of one prescribed set of questions of fact—whether the samples offered for import fulfil, when examined in a prescribed manner, certain prescribed qualifications. The general scheme of the two laws is quite different. Instead of committing all power in the premises to a single administrative group like the immigration authorities, the Tea Law divides up among various officials the functions which are to be performed. It creates (§ 2) a Board of seven experts to recommend standards; it provides for examiners at the several ports; it creates a Board, consisting of three of those persons who happen at the time to be General Appraisers, to act as an appellate court; and it directs the Secretary of the Treasury to fix the standards upon the recommendation of the boards of experts, and to make general regulations. The clause conferring the latter power (§ 10) is by no means as sweeping as many of those in other acts. It provides only that "The Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations". The act thus does not commit all its powers to one set of executive officers, such as the immigration authorities, who are to control the entire situation and apply their expert knowledge to the problems which arise, but distributes them among a number, no one of which is given control of the entire administration of the law.

The Tea Law does, indeed, like the immigration

statutes, specify what may come in and what must stay out. It provides in unmistakable terms that teas equal in purity, quality and fitness for consumption to the standards may come in, and that teas inferior to the standards in any of these three requisites are to be rejected. But it contains no provision committing to anybody the decision of all questions involving the right to enter. On the contrary, all that it refers to the examiner and, on appeal, to the appellate board, is the testing of the proposed import, for purity, quality and fitness for consumption, in comparison with the standard teas. Even this power is not committed to the unrestricted discretion of the examiners and of the board, but the method which they are to adopt is definitely prescribed. The testing has to be done "in accordance with the usages and customs of the tea trade," &c. All that the appellate board is therefore authorized to do is to determine, in a particular manner, a specific question of fact, and there is a notable absence of any of those sweeping general provisions, such as are present in the immigration statutes, which extend their powers so as to cover questions of law, or which confine to the administrative officials the consideration and determination of questions of construction which arise under the act and under the Treasury regulations.

This suit was not an attempt to induce the court to usurp any part of the exclusive jurisdiction thus conferred upon the appellants. The questions which the court was asked to decide were not the questions committed by the act to the administrative officers. The Act empowers the examiners and the appellate board to determine in the prescribed manner whether in fact the teas offered for import are or are not equal in purity, quality and fit-

ness for consumption to the standards. With their determination of that question in the manner prescribed by statute, the court has nothing to do. We do not ask its interference with the disposition of these questions. The issues upon which we ask a decision are issues of law. We ask the court to determine the construction of the act—the meaning of the words "purity, quality and fitness for consumption", and of the clause prescribing the test which shall be used. We ask the court to say what the question is which the law requires the Tea Appeals Board to decide, and by what method of examination it requires the Board to reach its conclusion. It is well recognized that such questions of construction are not ordinarily committed solely to the administrative tribunal for final decision (*Moore v. Robbins*, 96 U. S. 530), but remain within the jurisdiction of the ordinary courts. Our suit seeks an adjudication solely of questions of the class thus retained within the province of the courts. We do not seek to have the Board controlled in its decision.

It is true that in the immigration cases the decisions have gone so far that such questions as we seek to raise here might, under the immigration laws, be held to have been withdrawn from the jurisdiction of the courts and remitted to the administrative officials. Those laws, like the Tea Act, prescribe definitely the terms of admission to the country; and the meaning of those terms of admission is as true a question of law as any other question of the construction of a statute. As such it would normally be for the courts to decide, but the provision of the statute which renders final "all decisions" of the immigration authorities on the subject of the right of aliens to land appears to

withdraw from the courts and confer on the administrative officers power to determine it. Our contention is that, since the Tea Law contains no such provision, such questions of construction are not withdrawn from the jurisdiction of the courts, within which they normally fall.

Even if the Tea Law were not different from the Immigration Laws in that it lacks the provision making administrative decisions final on all questions, the principle of the immigration cases would not require a holding that there would be no jurisdiction here. All those decisions, substantially, seek to review decisions of the Administrative officers in particular cases—the precise field undoubtedly committed to them by the law. None that we have seen attacks a departmental regulation, as we do here, on the ground that it requires a violation of the statute. Neither does any of the cases attack, as contrary to law, an avowed intention, like that of the respondents here, expressed by an administrative officer, to apply the law construed in a particular way. If such a contention were made, even in an immigration case, it is probable that the court would instantly take jurisdiction. Take, for example, the following: The law admits Chinese, if they are citizens. Suppose during some popular anti-Asiatic agitation, that a regulation were promulgated requiring examiners to admit as citizens only such among persons otherwise qualified as had had an American grandparent, or such as were over forty years old, or over six feet high? Would the court hesitate for an instant to condemn such a regulation? And if the immigration inspector, in answer to the suit, should say, "True, the regulation is bad and not binding on me, but the matter is committed to my discretion and I intend to

exclude every immigrant less than six feet high"—would not an injunction issue *instanter*? Again, though the immigration laws do not, as the Tea Law does, prescribe the method of examination by which the question of fact is to be determined, would any court hesitate to interfere with a regulation requiring inspectors to decide the question of citizenship by wager of battle, or by flipping a coin? The truth probably is that not even the immigration laws delegate to the administrative officer power to decide, to the exclusion of the courts, the meaning of the law they administer, but that the requirements for admission, established by those laws, have been too clear to require construction or permit misapprehension by the department.

In the absence of any provision expressly delegating exclusive jurisdiction to the board, it seems clear that the court must retain its ordinary function of construing the law. The delegation of such powers to an administrative board certainly goes to the extremest limit of the constitutional power of Congress. Indeed, the immigration statute in question seems originally to have been sustained rather because of the inconvenience which would have resulted from upsetting it, than because the court was free from doubt of its constitutionality (*Lem Moon Sing v. U. S.*, 158 U. S. 538). No statute should be construed to work, by mere implication, so enormous a delegation of authority, unless such an intent is unmistakable on its face. Such a delegation makes the administrative officer at once sheriff, prosecutor and judge. It enables him to define his own function and powers as he pleases, and to exercise both in unrestrained tyranny. It is an unusual and abnormal form of legislation, contrary to the principles of

the common law; and there is no rule which would require the court to construe any statute liberally in order to bring it within this anomalous class. On the contrary, every statute conferring upon administrative officials powers over the individual and his property is to that extent in derogation of common right, and should certainly be construed with reasonable strictness. It is altogether outside the ordinary character of our institutions to clothe an officer with a set of powers and also with the unrestricted right to define those powers, so that he may broaden or narrow them at will. The unique fundamental feature of our Constitution is that not even Congress may determine the extent of its own powers. From the date of the original decision holding that our courts had the power to decide that statutes were unconstitutional, it has been the settled public policy of the country that the courts should retain and exercise the right to determine whether a person claiming official powers was or was not entitled to them. This public policy should lead the court to interpret the statutes in question, not so as to confer upon the Tea Appeals Board this abnormal power of determining its own jurisdiction, but so as to limit its functions to the decision of questions of fact to be defined by the ordinary process of judicial construction.

Judge Hough's decision, however, held explicitly that the Tea Law conferred on the Board exclusively the power to construe its requirements. He says (fol. 648) :

"The real question is whether failure to  
"comply with the standard in the matter of  
"color or coloring matter alone is to be con-  
"sidered an inferiority in purity or quality.  
"This is emphatically a matter of opinion—  
"of discretion."

He then goes on to state that the conclusion that the matter in dispute is one of discretion leads him to dispose of the case by a reference to *Louisiana v. McAdoo*, 234 U. S. 627, holding that courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution.

Surely, with all respect, this begs the question. It assumes that because the question as to what, under the Tea Law, is an inferiority in purity, is a matter of opinion, it must be a question committed solely to the Board. But the question, "What is an inferiority in purity?" is but another form of the question, "What does the Tea Law mean by purity?"—an ordinary question of statutory construction. It is indeed a question of opinion; but so is every other legitimate question of statutory construction. If merely because it is matter of opinion it is cut out of the court's ordinary jurisdiction and committed solely to the Board, so is every other debatable question. Of course, as to all questions which are actually committed to administrative officials, the principle of *Louisiana v. McAdoo* applies; but to apply that principle here is to assume the point at issue, by arbitrarily asserting the commitment of the question to the Board alone.

It is obviously true that on every re-examination of tea, the Board must determine the question of fact whether the import is inferior in purity to the standard. That question of fact is doubtless exclusively committed to the Board. It can be dealt with or approached, however, only after some one has construed the law to find out what it means by "purity". The whole purpose and effect of the act depend on the answer to that question of law. To

let the Board alone answer it is to let them make the law as well as enforce it. Of course, till the law has been judicially construed, the Board has to construe the statute for itself as best it may. It must adopt some meaning for the language it is to obey. This is true, however, of every provision of most statutes. All have to be executed by some officer. Each such officer has to use his own judgment on questions of construction in the first instance and till judicially corrected; and if that mere fact showed the intention of the legislature to commit such questions to them exclusively, the courts would be left powerless to construe any statute. The policeman who arrests a thief has first to construe for himself the statutory definition of larceny; but that does not show that the legislature meant to deprive the court of its right to construe the larceny statutes, and leave the matter wholly to the constable making his decision final. *Louisiana v. McAdoo* does not decide that a statute like the Tea Law clothes the administrative officers who are to enforce it with exclusive power to construe it. The statute in that case was radically different from the Tea Law in that it expressly did that very thing, giving the Secretary power to construe, and making his construction binding (R. S., § 2652; 18 Stat. 528). There is nothing of the kind in the Tea Law.

It is submitted that the authorities fully sustain our contention that under statutes which, like the Tea Law, delegate to administrative bodies power to determine questions of fact, the courts still have jurisdiction to construe the act so as to define those questions, and then to determine whether or not regulations governing official actions required by the act are valid—whether, indeed, any administra-

tive ruling, construing the statute and designed to govern the future action of the officers in enforcing it, is authorized. The authorities also sustain our contention that administrative officers may be enjoined from enforcing an administrative regulation which applies an incorrect construction of the law. This very thing—the grant of exactly the relief which we seek in the case at bar—was done by the Circuit Court of Appeals for the Eighth Circuit in *St. Louis Independent Packing Co. v. Houston*, 215 Fed. 553. In that case the Secretary of Agriculture, who, under the Meat Inspection Act, had power to make regulations similar to that of the Secretary of the Treasury under the Tea Law, made a regulation providing that sausage should not contain cereal in excess of 2% and requiring that when sausage did contain more than the specified percentage the inspectors should refuse to pass it. The complainants brought suit against the Secretary of Agriculture, the Chief of the Bureau of Animal Inspection and the local inspector. They were able to serve only the local inspector. Their bill of complaint alleged that the law did not authorize the rejection and condemnation of sausage on the ground for which the regulation required the inspectors to reject it. They therefore prayed for an injunction restraining the authorities from refusing, upon the ground mentioned, to mark the complainants' product as "Inspected and passed". The trial court denied the injunction, but the Circuit Court of Appeals reversed the decree and granted it. Examining the construction of the statute at length, they determined that it did not authorize the prohibition contained in the Secretary's regulation, and they accordingly forbade the enforcement of that prohibition. This de-

cision was reaffirmed, upon most careful reconsideration, when the case again came before the same court, after the Secretary had been brought in, in 242 Fed. 337. It is precisely parallel to the case at bar, in which we argue that the Secretary had no power to require the rejection of tea for color only, and ask an injunction restraining the authorities from rejecting it on that ground.

In *Morrill v. Jones*, 106 U. S. 466, the statute under consideration provided that animals if imported for breeding purposes might, upon proof satisfactory to the Secretary of the Treasury, be admitted free of duty, and authorized him to make appropriate regulations for the enforcement of the act. The Secretary's regulation required that proof be made that the animal offered for import was of superior stock. The court held that such a regulation was entirely unauthorized and that the requirement of proof satisfactory to the Secretary of the Treasury did not clothe him with power to define or construe the requirements of the law for admission of imported animals. The facts of this *Morrill* case tend in some respects more strongly than those of the case at bar to show that Congress meant to delegate to the Secretary power to decide all questions in regard to the admissibility of the imports in question. The Tea Law contains no language which tends to commit to the administrative officer power to define requirements for the admission of tea, or to construe the meaning of the requirements as expressed in the statute. The law in *Morrill v. Jones*, however, by requiring that proof satisfactory to the Secretary of the Treasury must be made, clothed him with a wide discretion. It was not unreasonable to argue that only animals of superior stock would actually be imported *bona*

*fide* for breeding purposes, and that accordingly a regulation stating that the Secretary would be satisfied only with proof of such quality was a reasonable method of carrying out the intent of Congress to admit only animals which actually were in fact imported for the required purpose. The Supreme Court, however, disposed of the question without difficulty, holding that such statutes do not confer power of legislation or of substantial construction of the law, and that the regulation tended to exclude some of the class admissible under the natural meaning of the act, and was therefore void.

A case still more closely analogous to the present is that of *U. S. v. Eleven thousand one hundred and fifty pounds of Butter*, 195 Fed. Rep. 657. There the statute imposed an extra tax on butter containing under certain circumstances "abnormal quantities of water, milk or cream". The Secretary of the Treasury was by a number of statutes clothed with the most sweeping powers of enforcing the law and generally of making regulations upon the subject. (See p. 663.) Assuming to act under these powers he promulgated a regulation to the effect that butter containing 16 per cent. or more of moisture should be deemed to contain an abnormal quantity within the meaning of the act. The Circuit Court of Appeals—interpreting this regulation in the most limited possible way so that it might not effect an absolute change or enlargement of the statute but would operate merely as a rule for the construction of the words "abnormal quantities"—held it invalid, on the ground that even the most general power to make regulations enforcing a statute does not take away from the courts the power to construe the statute, and does not confer that

power upon the executive. The facts of this case are far stronger against the jurisdiction of the courts than those of the case at bar. The Secretary's powers of making regulations were conferred in much more sweeping terms, and the regulation itself, as treated by the court, purported to be nothing more than a reasonable construction of the requirements of the act. On the other hand, as we shall show hereafter, the Treasury Decision excluding all tea for mere color, irrespective of other impurities, was not a reasonable construction of the requirements of the act, but an out-and-out piece of independent legislation, imposing new and additional requirements for admission.

In *U. S. v. United Verde Copper Co.*, 196 U. S. 207, this Court held that a statute which definitely committed control of certain public lands to the Interior Department, and authorized the Secretary in very comprehensive terms to make regulations for the enforcement of the act, did not authorize him to give it an authoritative and final construction. The act permitted the use of timber on the lands in question for certain defined purposes, including "mining and other domestic uses." The regulation which was held void ruled that smelting was not one of the permitted purposes. The Supreme Court said of the power contended for:

"Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary" (p. 215).

One of the latest cases in this Court on the subject and in some respects the strongest is that of *U. S. v. George*, 228 U. S. 14. There the statute committed to the Interior Department and in particular to the General Land Office the entire business

of the management of the public lands in question. The statute prescribed the prerequisites for the issuance of patents, which included a specification of the matters which a homestead claimant was required to make oath to. The provisions which gave the Department power to make the regulations were of the most general and sweeping nature, and included (§ 2246) a special provision authorizing the requirement of oaths. Assuming to act under this section the regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof, and provided, as a prerequisite for the issuance of a patent, that "the claimant would be required to testify as a witness in his own behalf in the same manner"—thus requiring an oath in addition to that specifically called for by the statute. The Court, under the authority of *U. S. v. United Verde Copper Co.*, *supra*, held that this regulation was unauthorized. The opinion quotes from the *Verde* case the following language:

"If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

Other cases in which departmental regulations assuming to construe statutes have been held void on similar grounds are:

*Williamson v. U. S.*, 207 U. S. 425;

*Brougham v. Blanton Co.*, 243 Fed. 503;

*U. S. v. Foster*, 211 Fed. 206;

*Bruce v. U. S.*, 202 Fed. 98;

*In re Page*, 128 Fed. 317;

*U. S. v. McMurray*, 181 Fed. 723;

*St. Louis Co. v. U. S.*, 188 Fed. 191.

The above authorities, we respectfully submit, and the reasoning upon which they are based, establish that a statute of the class to which the Tea Law belongs is not to be construed as cutting off the jurisdiction of the courts, unless the intention of Congress to do so is manifested unmistakably. They also hold, equally clearly, that no such intent is manifested by provisions much more sweeping in their delegation than those of the Tea Act. They demonstrate that under such enactments the courts still retain the power and duty to determine what the question of fact is, which is committed for decision to the administrative officers, what the requirements are, as to the fulfillment of which they are to enquire, and by parity of reasoning, whether the method of examination adopted is that required by the statute. The right of the court still exists, therefore, to determine what powers the Act confers upon the appellate Board and upon the Secretary of the Treasury, and whether the Secretary's regulations command a violation of the law, by directing exclusion of teas which the law would admit, or by requiring that they be examined by an unauthorized test.

The cases cited by counsel for the respondents, for the proposition that the court has no jurisdiction to grant the relief prayed, do not support his contention. *Buttfield v. Stranahan*, 192 U. S. 470, decided only that the Tea Law was constitutional and that the Collector was not liable in damages for refusing to admit teas which had been rejected for inferior quality, even if the examiners had erred and the teas were in fact of superior quality. The case was argued on both sides wholly on the constitutional questions; and all of the appellant's contentions as stated by the court (pp. 491-2) were

assertions that the law was for different reasons unconstitutional. The decision that the act was valid involved a holding that the courts could not review the action of the examiners in determining in the lawful manner the question of fact committed to them—that is, the question whether the tea offered for import was in fact equal or inferior to the standard in purity, quality and fitness for consumption. Neither the decision, however, nor any dictum in the opinion went further, or passed either explicitly or implicitly on any of our contentions, none of which were made in the *Buttfield* case. In that case, there was no contention, such as we make here, that an unauthorized order of the Secretary of the Treasury directed a decision of the question of fact upon an unauthorized ground, or by the use of an unauthorized test, or that the examiners were threatening to do the same things on their own authority. The court must, therefore, have assumed that the examiners found the teas in their judgment, inferior to the standards in the respects required by the statute, whatever those respects were. This decision, and the similar cases of *Buttfield v. Bidwell*, 192 U. S. 498, and *Buttfield v. U. S.*, 192 U. S. 499, decided only propositions with which we have no quarrel. The cases of *Sang Lung v. Jackson*, 85 Fed. 502, and *Cruickshank v. Bidwell*, 86 Fed. 7, 176 U. S. 73, add nothing to the law laid down in the *Buttfield* case. *Macy v. Loeb*, 205 Fed. 727, is, as the Circuit Court of Appeals itself stated, exactly controlled by the decision in *Buttfield v. Stranahan*. There the attempt was merely to review the action of the examiners. The allegation was that the decision of the examiners was erroneous. There was no allegation of any attempt on the part of the examiners or the board of general appraisers or of

the Secretary to exceed the authority conferred upon them by the act. And even the majority opinion seems to intimate that it is only the question of fact which is committed to the examiners and to the board, and that the extent of the requirements of the act as to the matter of the re-examination is an ordinary question of law to be determined by the courts. The only attempt of counsel for the complainants to distinguish the case from the *Buttfield* case was by the argument that the requirement of the act that the teas be "duly" examined meant an examination at which the importer had a right to be represented. This contention the majority of the court rejected. Judge Ward, however, dissented.

In the second case of *Macy v. Loeb*, unreported, which dealt with an amended version of the bill in the first case, the substantial contention was that the same consignment of rejected teas was unlawfully rejected because the board of general appraisers was not duly constituted, one of them not having been designated by the Secretary of the Treasury as required by the act, but by the president of the board of general appraisers. The court held that this did not vitiate the act of the board since a majority lawfully designated by the Secretary concurred in the result of the examination. The case has therefore no possible bearing upon the issues in our case.

It seems therefore that all the objections to the jurisdiction fail, and that the court was in duty bound to issue the injunction as prayed, if it found that we had shown equitable grounds for the relief prayed.

**POINT II.**

**The injunction was properly granted. The Tea Law does not authorize rejection for color only. It commands examiners to admit teas which, when examined in the lawful manner, are found equal in purity to the standards, even if they contain color and the standards do not.**

The requirements of the act are extremely definite. It establishes standard samples of tea which are to be in the hands of every examiner for comparison with the samples offered for import. The latter are to be tested, in comparison with the standards, in the particular method required, and if, when so tested, they are found equal in purity, quality and fitness for consumption, they are entitled to entry. The question therefore turns, in substance, upon the true meaning of the words "purity, quality and fitness for consumption." There is no dispute in the present case as to the meaning of the words "quality and fitness for consumption", or as to the superiority of the teas in question to the standards in both respects. The only question on this branch of the case is therefore as to the meaning of the word "purify". The Secretary of the Treasury, in ruling that no teas containing any color shall be admitted, asserts a right to require that all teas containing any color whatever, even in infinitesimal quantity, be deemed inferior in purity. The appellants, in asserting their intention to reject on the same ground, claim a right to lay down and enforce a rule, affecting the

complainant's property, which is justifiable only if it represents the true meaning of the Tea Law. It is respectfully submitted that this regulation is not even an attempt to construe the law, but is pure out and out legislation—the addition of a new requirement for admission, not specified in the Act.

The Tea Law must be presumed, in the absence of evidence to the contrary, to use words in their ordinary sense. The ordinary definition of the word "purity" is not a matter of doubt. The dictionary definitions show that, without exception, the primary meaning attributed to the word by all the lexicographers is, in substance, "freedom from foreign matter". The learned trial judge himself in his opinion (fol. 635) defines it in the same sense; and the learned Assistant Attorney General, in his brief in this court (pp. 14, 15), does likewise. Tea is a substance to which this ordinary definition can apply with perfect ease. It consists of the dried leaves of the tea plant and nothing else. Anything else than tea leaves (whole or in fragments) if included in the packages in which tea is commercially dealt with, is foreign matter, and is unmistakeably outside of the ordinary meaning of the word "pure". In many cases litigants contend that, as used in other statutes, the word "pure" has not this absolute and strict meaning, and that they are entitled to have considered as pure, substances which as matter of fact contain considerable quantities of extraneous matter. Here, we ask no such liberality. We believe that every particle of foreign matter in tea—whether our tea or the Government's—renders it *pro tanto* impure. There is nothing in the testimony or in the decisions either of the courts or of the Treasury Department, or otherwise in the history of the Act, to show that the word can be interpreted in any other than its

primary and ordinary sense. In that sense everything which is not tea is impurity, and of two teas that is the purer which contains the greater proportion of tea and the less foreign matter.

The Tea Law does not require absolute purity, but only purity equal to that of the standard tea. It therefore contemplates the existence of impurity in both standard and import, and permits the import to contain an amount of impurity measured by that in the standard. As to what that impurity shall, or shall not, consist in, the statute is silent. It contains no suggestion that any one form of foreign matter is to be given greater effect than another in estimating the comparative purity of standard and import. No particular impurities are referred to. Color is not mentioned in the act, which places all forms of impurity on an exact equality by specifying none and requiring that tea be excluded for impurity exceeding that in the standard, irrespective of its nature. This requirement of purity, construed in accordance with the dictionary meaning of its words, is simply a requirement that the import consist, to an extent or in a measure to be fixed by the selection of the standard, of tea, and of tea only. This primary or literal meaning is, we submit, the true meaning. There is no need to stretch the construction so as to make the requirement of purity take care of the quality as well as the quantity of the foreign matters present. The statute attends to that by a separate clause—the requirement that the import equal the standard in "fitness for consumption". The smallest excess of any injurious ingredient does obviously make the import less fit for consumption than the standard. This provision, therefore, permits the rejection of teas which contain any considerable amount, however small, of

any injurious form of matter, or of any substance which damages the tea as a beverage, if the standard contains less of the same material. But these injurious or damaging substances are the only ingredients which the act forbids, or permits to be singled out as in themselves reasons sufficient for rejection. On familiar principles—*expressio unius est exclusio alterius*—the specific provision, excluding teas for impurities such as render them less fit for consumption than the standard, shows that Congress intended not to treat other kinds of impurity in the same way. Color is practically conceded not to be injurious, or damaging to the tea as a beverage. It accordingly falls within the general class of impurities which Congress thought fit to class together as equally objectionable or unobjectionable, and to condemn only when their aggregate amount reduces the proportion of tea in the import below that in the standard.

The practical construction of the Act, for more than fourteen years after its enactment, shows very distinctly that during that period the word "purity" was used in the sense for which we contend. The regulations, from the start, show that a number of radically different forms of foreign matter were to be expected in teas, and required the examiners to look for such matters, and to reject the teas if these impurities were found in quantities sufficient to render the total impurity greater than that shown by the standards. For example, in the original regulations of 1897 (T. D. 17995), the first under the existing law, there are a number of recognitions of the importance of foreign matter, irrespective of kind. The standards prescribed are required to contain no more than 10 per cent. of dust "inasmuch as any excess

over this percentage of dust or fanning is liable to be made up of extraneous matter."

Again in prescribing the method of comparison with standards, it is provided:

"The leaf of the infusion must equal the standard in freedom from scum, gritty substance and leaf made up from dust and congee (*i. e.*, rice paste)."

Again at the end of paragraph 20:

"We have known the natives to go as far as the pack teas with 25 per cent. of dust, rendering them very trashy and almost unfit for use."

In T. D. 18191 of July 16, 1897, the Assistant Secretary states that the Committee of Tea Standards has ascertained that teas in China have frequently been packed with excessive dust, not their own, but simply the refuse in China hongs in order to reduce the quality in proportion to the price. In a general instruction (T. D. 18594 dated November 27, 1897), the examiners are directed

"when examining samples of importations of Ping Suey tea to be governed by the amount of scum appearing on the surface of the liquor, as well as by other evidences of impurity, such as poor or decayed leaf, foreign matter and inferior quality, as indicated by the smell, taste and appearance, and to reject all such teas as produce, when infused, more scum than the standard."

In 1898 the regulation prescribing comparison with standards was modified so as to read as follows (T. D. 18933, dated February 7, 1898, Par. II):

**"COMPARISON WITH STANDARDS.** In comparing with standard examiners are to test

all the teas on these points, namely: for cup quality, for *any foreign matter* on the surface of the infusion, sometimes called scum, and for quality of leaf after infusion. Cup quality shall be ascertained by drawing according to the custom of the tea trade with the weight of a half dime to the cup. . . .

In order to test for floating coloring matter or scum . . . a second drawing should be made of double the foregoing weight. Before disturbing the infusion, examination should be made for any floating substance, and after pouring off the water the infused leaf should be taken out so as to exhibit the lower side which rested against the cup. Should the mass show a greater quantity of exhausted, decayed leaf or inferior leaf, or *foreign substance* than the standard, it shall be considered inferior in quality, and the tea must be rejected."

And again in the same regulation (Par. II):

"Should a tea prove on examination to be inferior to the standard in any one of the requisites, viz.: cup quality, scum or quality of infused leaf, it shall be rejected . . ."

This latter regulation remained in force substantially unaltered until 1911 when the regular chemical analysis was promulgated, and this was soon after superseded by the original form of the Read test. Regulation 22 of T. D. 31343 dated March 1, 1911, requires a further test for coloring matter or *other foreign substance* by examination of any sediment remaining in the cup.

Again in the original chemical analysis prescribed in 1911 by T. D. 31920, the examiner is directed to look for a number of different varieties of extraneous matter.

These regulations tend strongly to show that, at the time of the enactment of the law, and for years

thereafter, any substance not part of the tea leaf was deemed an impurity; that color was treated as simply one among many such foreign substances; and that the question which the examiners were directed to solve was just what we believe it should be—that of the relative purity, or comparative total impurity of the two samples. This was the meaning attributed to the Act by all, even by the Treasury Department itself, before the present questions arose. We submit that such a practical construction is entitled to great weight, and when, as in the present case, it coincides with the dictionary meaning of the word used, and with the simplest and most natural interpretation which can be placed upon it, should be conclusive. That construction would certainly have been strongly maintained by the appellants, if the boot had been on the other leg, and we had been contending that some particular form of foreign matter was not an impurity. They would have argued impressively that the failure of the statute to discriminate put all foreign substances on a par, as equal impurities. As it is, the appellants' own counsel used the word in the sense for which we contend (fol. 437).

If this be the true meaning of the word "purity"—freedom from every kind of foreign matter—the conclusion cannot be escaped that the statute requires that all forms of foreign matter be considered in determining whether or not the sample offered for import is equal in purity to the standard. Of course, if the standard contained no color and the sample offered for import contained color, and neither one contained any other variety of impurity whatever, the sample would be inferior to the standard and would have to be rejected. We do not now question the right of the Secretary to

select, if he can, a standard containing no foreign matter whatever, in which case—and in which case only—an import containing any color would necessarily be less pure than the standard, and could properly be excluded for color alone. As soon, however, as it appears, that a standard contains other impurities, the sum total of the impurity or foreign matter in the standard may be so great as vastly to exceed the total quantity of color present in a sample offered for import. In that event, the sample may contain less total foreign matter than the standard, and the only way in which the relative purity of the two can be determined is by comparing the total quantity of foreign matter present in each, including color.

No better example could be given than arose in the case at bar. According to Dr. deGhuée's uncontested testimony, the government standards contained in the neighborhood of 2,000 parts to the 1,000,000 of mineral impurity, including color; while the samples offered for import contained from 700 to 1,000 parts to the 1,000,000 less total mineral impurity, including color (fol. 494). The samples offered for import, however, included *one* part in a million of color, while the standard teas included some, but a lesser quantity, of the same material. Accordingly it appeared that the standard contained nearly twice as much total impurity as the sample offered for import, and that the quantity of color contained in the sample offered for import was not much more than 1/1000th part of the total mineral impurity present in the standard. Accepting the testimony of the government chemist to the effect that some of the teas in question contain as much as 19 parts to the million of color, the total quantity of color was less than 1/20th

part of the mineral impurities discovered by Dr. deGhuée in the government's standards. These illustrations, unimportant in themselves, demonstrate beyond a doubt that teas in practice do contain, as obviously they may contain, more color than the standard and yet vastly less total impurity. It follows, therefore, that a regulation directing the exclusion of teas for color only, completely disregards all other impurities and would require the examiners to hold that a tea containing one part in a million of color and no other impurity whatever was inferior in purity to a colorless standard containing 100,000 parts in 1,000,000 of the most dangerous organic filth. It is respectfully submitted that there is no conceivable meaning of the word "purity" within which such a determination could be deemed reasonable. Surely Congress, in enacting that teas purer than the standard might come in, never meant any such absurdity as to permit an examiner to hold that a tea which was half dirt was purer than a tea of which all but a millionth part was tea.

It has been suggested by the appellants that the teas in question were examined for impurities other than color, but have already demonstrated that they are superior to the standards in regard to freedom from other impurities, so that no question remains except as to their color contents. This is an assertion that the relative purity of standard and import can be determined by comparing the color contained in each, without giving the import any credit at all for admitted superiority in freedom from other impurities. It amounts to a contention that the Treasury Department has the right to require a separate comparison between standard and import with regard to each possible

form of impurity, and to require that the teas be rejected if they contain more of *any one* of these impurities than do the standards, no matter how much less of any or every other impurity may be present in them than in the standards. This is legislation with a vengeance. The statute requires equality with the standard in only three requisites—purity, quality and fitness for consumption. The appellants now claim the right to split up the general requirement of purity into a score of separate requirements, failure in any one of which will cause the rejection of the tea. They say in substance: we may examine by one process for color; by another for sand; by another for imitation leaves; by another for paraffine; by another for catechu; by another for added tannin extract; by another for clay, &c., *ad lib.*, and if in any one of these respects we find the tea offered for import inferior to the standard, we have the right to deem it inferior in purity and reject it, however superior it may be in freedom from all the other foreign substances.

Surely this is not the meaning of the Act. What is required is general purity equal to that of the standard, not purity with regard to each of a dozen or more possible ingredients. The statute fails to discriminate between different forms of impurity and we must, therefore, assume that none was thought to lessen the purity of tea to a greater extent than an equal quantity of any other. It does, by the clauses requiring equality to standard in quality and in fitness for consumption, provide against such particular impurities as may, in and of themselves, impair the quality or wholesomeness of the import. Such impurities as color, however, which damage neither the quality nor the fitness

for consumption of tea, are dealt with only by the general requirement of purity. In view of the direct legislation against substances which injure quality or wholesomeness, the failure of Congress to discriminate against any other kinds of impurity must be deemed intentional. The history of the subject shows that so far as color is concerned, it was intentional. Green teas were always colored in 1897 when the Act was passed, and color would therefore certainly have been specially referred to if thought an impurity more important than others, or if "purity" had been used in a sense in which a clean tea containing microscopic color could be called less pure than a dirty tea which contained no color. Beyond doubt, however, color in moderation was not deemed objectionable. Its harmlessness is substantially undenied. The evidence shows that for fourteen years after the passage of the Tea Law substantially all green teas offered for import contained considerable quantities of color; yet during all that time the statute remained unaltered, while the regulations treated color simply as one among many equally important or unimportant impurities, all of which were to be considered in comparing purity.

If the requirement of the statute were of *absolute* and not, as it is, of *comparative* purity,—equality with the standard in purity—the presence of any one kind of foreign matter would of course condemn the sample under examination, unless that particular variety of foreign matter was so usual and so expected as not to constitute an impurity at all. But where, as in the case at bar, the question is not of absolute but of relative purity—of purity in comparison with that of a standard sample—the rejection for one single impurity alone inevitably re-

sults in the total disregard of all others in the standard, however great in quantity. The contention of the respondents, that the impurities may be compared separately, and the import rejected if any one of such impurities appears in greater quantity than in the standard, amounts to a claim of power to impose any number of separate requirements instead of the single statutory requirement of relative purity,—power, that is, to require that the import contain less sand, *and* less clay, *and* less bogus leaves, *and* less added tannin, *and* less organic filth, *and* less of any other substance which may be named, than the standard, instead of merely less total impurity. This is as arbitrary as it would be for an accountant charged with the duty of determining whether an alleged bankrupt's financial position was or was not equal to the standard prescribed by the Bankruptcy Law—that is, whether he was or was not insolvent—to split up the man's assets into different classes, and his liabilities into different classes, and declare him insolvent if any one of these classes of assets did not equal the corresponding class of liabilities; if, for example, his bills receivable did not equal his bills payable. The bills receivable in question might be less than the bills payable by only \$1,000—while his other assets might exceed the liabilities by millions, and still this method of determining the question would result in a holding of insolvency. This is no more absurd than the appellants position. They claim the right to reject a clean import as more impure than a dirty standard, if a particular class of foreign matter in the import exceeds the similar matter in the standard.

The appellants suggest that the import is compared with the standard as regards contents of

foreign matter other than color, by the cup test and otherwise. The fact is, however, that the examination for color, as directed in Regulation 22, is apparently the only examination which the regulations direct for the ascertainment of purity. Regulations 20 and 21 provide for the cup test in accordance with the customs and usages of the tea trade, but this is now in terms applied solely to the ascertainment of *quality*. The provisions of the former regulations which apply this test to the ascertainment of the presence of foreign matter have been carefully left out of the regulations, and the cup test is now applied solely for quality. It is true that, by this cup test, the examiners are to look for exhausted leaves, but the presence of such exhausted leaves is referred to as affecting the quality of the tea, not its purity. This is another indication of the correctness of the construction of the word "purity" for which we contend. Within that construction exhausted leaves would not be an impurity, since they are in themselves tea, and not foreign matter. They are of course highly inferior tea, and their presence would naturally affect the quality of the entire sample. The regulation is therefore perfectly logical in describing the examination for exhausted leaves as an examination for quality. There is thus no examination for purity except by the Read test, but if there were it would be nugatory, because nobody pretends that, as against color contents, any credit is or will be given for superiority to the standard in freedom from other impurities.

To our contention that "purity" means general purity, counsel for the appellants replies in substance that the statute commits exclusive power to define this term to the board of seven experts who are to recommend standards: and that if they select

a colorless standard they thereby define "purity" as equivalent to "colorlessness". There is nothing in the statute to justify this. The board of experts is authorized solely to recommend standards which, when adopted, establish the measure by which the purity of imported teas is to be judged. They furnish the yardstick, but neither tell what a yard is nor what sort of material may constitute a yard. Their function is limited to the selection of physical quantities of teas. The impurity in these teas, as in every other kind of merchandise, is of many different forms. The experts can select standards containing much or little of such impurity, which may be of any kind; but there is not a word in the act which even suggests an intention on the part of Congress that they, or the Secretary either, should have the right to determine, to the exclusion of the courts, what Congress meant when it said "purity". The experts and the Secretary can determine, by setting standards, what the imported tea must be equal to; but Congress has itself determined in what respects the import must equal the measure. The argument really is that by giving power to the experts to select the particular tea which the import must equal in purity, the law also gave them power to require that the import also equal the standard, not alone in purity, but also in each of any other characteristics it may have—in freedom from every impurity separately. This is like saying that because the proper commissioners have power to establish standard measures at Washington, they may, by selecting, as the standard gallon, a cube-shaped platinum vessel, require that all gallon cans be cubic and made of platinum.

The appellants also argue that our construction of the clause requiring purity is incorrect because,

they say, it is impossible "to take the sum or average" of different impurities. This, says the distinguished and learned counsel for the government, is "preposterous" (brief, p. 21), and again, "The mere statement . . . shows its ridiculousness" (brief, p. 13). In spite of this restrained and dignified condemnation, we feel that the appellants' argument in this behalf may properly be qualified as mere assertion. Every particle of non-tea matter in the merchandise is impurity. The comparative total amount, in standard and import, is readily ascertainable, roughly by the cup test, or accurately by that ordinary form of general qualitative and quantitative analysis which the ordinary layman and legislator has in mind when he speaks of chemical analysis. No difficulty arises until, departing from the act, which treats all impurities alike, the attempt is made to single out particular impurities, and give them an effect greater than that which they would have as a mere part of the total mass of foreign matter. It may be that this lumping of all impurities together, as equally objectionable, is not as wise a provision as the learned counsel for the appellants could devise, or the Secretary promulgate. But it is the provision which Congress has enacted, and it should not be repealed by either departmental or judicial construction. It seems to us, however, a common-sense enactment, and as practically construed for fourteen years it worked fairly substantial justice. Teas less clean, all told, than the standards, were readily shown up by the cup test, whatever their impurity was. This test was the result of business experience, and was doubtless for that reason, the method primarily required by the act. In practice, it accomplished very well that summing up of the total impurities which

counsel call impossible. Only after the regulations were so modified that the cup test was no longer used in testing the comparative purity of the teas, but was applied solely to ascertaining their quality, was any such difficulty imagined.

Indeed, what the government says is impossible, preposterous and ridiculous, is done every day under one of the most important laws on the statute-book. The practicability of such a requirement of general purity, making no distinction among impurities, but demanding only that, all told, the foreign matter present shall not exceed a given figure or percentage, is proved by the fact that under the Pure Food Law just such a requirement is common. That statute provides that a drug which differs from the standard of purity laid down by U. S. Pharmacopœia shall be deemed adulterated. In numerous cases, in fact in the case of nearly every one of the commoner chemicals, the Pharmacopœia, by requiring only that the drug contain a fixed percentage of the substance which it purports to be, permits a given percentage of foreign matter. This foreign matter may be of any kind whatever, except for such particular ingredients as are specifically excluded or forbidden. (For examples see U. S. Pharmacopœia, Ed. 1900, pp. 235, 363, 395.) There is no difference, in substance, between a rule like that of the Pharmacopœia, requiring for example, that Calomel contain not less than 99½% Mercurous Chloride, and the rule of the Tea Law requiring that tea imports shall contain as little non-tea or foreign matter as is contained in a given specimen or standard. The Pharmacopœia measures the permitted amount of foreign matter by a definite percentage; the Tea Law by a physical example or standard. The two rules set up identically the

same requirement of general purity. When, in addition to this, it is desired to require the absence of specific ingredients, the Pharmacopœia expressly provides that the substance shall not contain more than a given amount of them. The presence of such specific prohibitions, directed against all ingredients deemed specially undesirable, in the Pharmacopœia, and the absence of anything of the kind in the Tea Law, confirm our view that the latter was intended to require only purity in the general sense.

From all these considerations it seems to us to follow very plainly that the Tea Law authorizes the rejection of tea only for total impurity (in the sense of aggregate foreign matter) exceeding that of the standard, and that the Secretary of the Treasury, in ordering the rejection of tea for color only, is commanding the examiners to reject tea which may be vastly superior in purity to the standards, and is therefore assuming to change the requirements specified in the Act, and to forbid the admission of tea which the law gives the right to import. It is, however, to be presumed, and the appellants assert, that they intend to obey this order. It is apparent that our teas, if examined under this regulation, may be rejected in spite of the fact that even on the basis of the government's testimony they contain less total impurity than the standards. We therefore submit that the case for equitable relief is clear, and that the appellants were properly enjoined from rejecting our teas on the sole ground that they contain color, or on any other ground having reference to their purity, except they be found to contain more total impurity in the sense of foreign matter generally than is to be found in the standards.

**POINT III.**

**Irrespective of the correctness of the decision appealed from the complainants were entitled to and should be granted an injunction restraining the appellants from determining the admissibility of the teas by the result of an examination conducted in the manner prescribed by Regulation 22 of T. D. 33211. That method is unauthorized.**

The case of *Merritt v. Welsh*, 104 U. S. 694, established—if authority were needed—that where Congress has required that the admissibility of an import be determined by examination, in comparison with standards, by a particular test, the Secretary cannot by regulation require another kind of test, however superior.

The Tea Law prescribes the test which is to be applied. It requires that the purity, &c., of the tea be “*tested*”, in comparison with the standards, in accordance with the customs and usages of the tea trade, including the infusion test and, if necessary, chemical analysis. It would seem elementary that the method of examination which is to be prescribed must have some tendency to accomplish the purpose for which it is to be prescribed. A method of examination which is to be used in testing the relative purity of two samples must, we submit, be capable of giving some information on the subject. Unless it has the power to determine with some approach to reasonable accuracy which of the samples is the purer, it cannot “*test*” the comparative purity of the two.

So far as we can see it is undisputed that the method prescribed by Regulation 22 entirely fails to meet this requirement. The testimony of Dr. deGhuée and Dr. Chandler to the effect that the test showed absolutely nothing as to the presence of any form of foreign matter, other than color or facing, is not only uncontradicted, but is concurred in by the appellants' witness (fol. 369). Indeed contradiction would be impossible, as the very nature of the test shows on its face that it could not possibly detect the other forms of impurity present in tea, since nothing can possibly be shown by it except substances capable of smearing the test paper. Accordingly, even if the test were accurately quantitative as to color, even if it would show exactly how much color was in each tea, it would have no tendency to show whether the total impurity in the sample offered for import was equal to or less than that in the standard. The required examination is therefore incapable of doing the work demanded by the statute. It cannot test the relative purity of the two teas.

But even when used for the sole purpose of discovering color, the method prescribed by Regulation 22 is unworthy to be called a test at all. The testimony shows beyond question that it gives no reliable information of any sort, quantitative or other. Dr. deGhuée testified that it would not show color even if present in considerable quantity, if sufficiently finely divided. The testimony of the appellants' witness, Dr. Acree, to the effect that he had failed to color teas so as to produce this result (fols. 444-454), does not of course disprove Dr. deGhuée's testimony that he, by a different method, had succeeded. On the other hand, the truth of Dr. deGhuée's statement that color

may escape the test is apparent from the fact that he found, with the microscope, hundreds of color particles in the government standards, which were proof against the Read test. Accordingly, the results of the Read test, even when used solely to find out whether color is present or absent, may be utterly vitiated by the fact that the color present in the standard may be more finely divided than a less quantity present in the sample offered for import. Moreover, the proof was conclusive that even when there is no difference in the fineness with which the coloring matter is divided, the test is grotesquely uncertain. The appellants' witness Dr. Cameron thought that it did give a roughly quantitative result, but on being shown the two Read Test sheets introduced by the complainants for teas artificially colored with *the same amount of the same coloring matter* (Exs. 3 and 5), stated that in his opinion one of these showed the presence of a great deal more coloring matter than the other (fols. 359-361). If the test had, under any conditions, any quantitative value, such as he testified it had, he would have been right. As it was, Exhibit 3, a sheet well smeared with blue, was obtained from tea colored as much and no more than the tea from which Exhibit 5 was had, which showed only a few almost invisible specks.

And if it could be said that the method prescribed by Regulation 22 was a method of testing the relative purity of the standards and of the samples offered for import, we submit that its use would still be unauthorized. The Tea Law permits only such a test as is "in accordance with the customs and usages of the tea trade, including \* \* \* if necessary, chemical analysis". The Read test as prescribed in Regulation 22 is con-

cededly not known to the customs and usages of the trade. The appellants assert that its use is justified by the provision permitting the use "if necessary" of chemical analysis, and they insist that the process which the regulation requires is a form of chemical analysis. If this were so, however, it would be immaterial. If the method of examination prescribed were the plainest chemical analysis ever known, it would still be illegal because, as shown above, *it is not a test of the relative purity* of standard and import, and the statute imperatively requires such a test. To require a chemical analysis is not enough. The statute calls for one which is capable of making the necessary comparison.

But Regulation 22 does not require any chemical analysis at all. Dr. Chandler and Dr. deGhée say it does not (fols. 291-6, 186-9), and their great authority is supported by satisfactory reasoning. The test is merely a mechanical separation of substances, performed without chemical means—a mechanical analysis having no chemical characteristic. The question whether or not the process prescribed is a chemical analysis, turning as it does on the meaning of a statute, is not one of the scientific, but of the ordinary, use of English. The words "chemical analysis" were doubtless used by Congress in the sense in which they are understood by the man in the street. It is respectfully submitted that that sense, as shown by the dictionary definitions submitted and otherwise, is precisely that stated by Dr. Chandler. A chemical analysis is something which finds out what substances there are in the product under examination, and how much of each. Surely no layman would ever imagine that, if he called for a chemical analysis of anything, his request could possibly be met by a process which sim-

ply sought to ascertain whether or not one ingredient was present. We have no hesitation in affirming that any man, not a chemist, who should ask for a chemical analysis of a substance, would inevitably expect to be told, in reply, all that the chemist could tell him as to at least what ingredients were present. This definition is exactly in accordance with that which Dr. Chandler, whose experience and authority is certainly greater than that of any of the other witnesses, testified was the proper meaning of the words. He stated in substance that chemical analysis meant a general examination disclosing all the main ingredients and that the examination to determine the presence or absence of a single ingredient would properly be termed a chemical test. This testimony certainly accords with ordinary experience.

The question as to what is meant by chemical analysis seems to have been touched by the courts only in one case. In *Shivers v. Newton*, 45 N. J. Law, 469, the Court were discussing a statute that provided that milk that contained more than 85 per cent. of watery fluids or less than 12 per cent. of milk solids should be held to be adulterated, an analysis was defined as follows:

“An analysis is supposed to be a determination arrived at *with accuracy* because scientific. But it is upon the fact of the analysis that the case rests. An analysis means a scientific *and therefore accurate ascertainment* of the elements and their proportion contained in the fluids submitted for examination. The fact that a certain man made an examination, disclosing the existence of a certain proportion of solid and fluid elements in the milk amounts to nothing unless it is an analysis; *an accurate ascertainment of the elements by chemical process*” (pp. 475, 476).

The government witnesses were apparently able to express the opinion that Regulation 22 called for a chemical analysis because they defined the words so broadly as to include any examination which had the purpose of identifying any chemical substance or chemical quality. One of them went so far as to state that even the separation, by hand, of sand from sugar, would be a chemical analysis if you guessed the nature of the sugar by looking at it (fol. 368); while another stated that it would be a chemical analysis if you broke up the chair on which you were sitting, and by looking at the fragments identified them as being made of wood (fols. 376-7). Of course a definition so broad as this, while it may be scientifically defensible, is nothing short of nonsense when attributed to laymen or the man in the street, or when applied to the construction of a statute dealing, not with a science, but with a plain business. If the phrase can be used in any such loose sense, the boy who picks slate from coal at the mines, and the farmer who removes chaff from wheat, are performing chemical analyses. But a Congressman who talks about chemical analysis means something very different from separation by hand of sand and sugar, or the breaking up of a chair. He necessarily refers to some process having chemical characteristics and looking toward the ascertainment of the general make-up of the substances in question.

The appellants seem to contend that the meaning of the words "chemical analysis" depends upon the purpose with which the examination is undertaken. They assert in substance that if you seek a piece of chemical information, that is, information as to the chemical nature of anything connected with the

product under examination, anything you do in the course of your search becomes a chemical analysis. If this be so, it is impossible to determine whether or not a given process is a chemical analysis until you know its purpose. In other words an examination which has no chemical features whatever, which may be as simple as a, b, c, and may be performed by a deaf, dumb and blind person ignorant of the existence of chemistry, may be a chemical analysis if its purpose can be described as chemical. Conceding that Regulation 22 calls for no chemical operations, they assert that because its purpose is to identify a substance, which like any and every other substance, may be called chemical, it becomes a chemical analysis. Assuming this to be true, we respectfully submit that even so it is not such a chemical analysis as was contemplated in the Act. If the purpose determines what is and what is not a chemical analysis, then the question as to what is the kind of analysis called for by this Act must be determined by the purpose specified in the Act. The Act calls for a test of the comparative general purity of two samples. Clearly such purity cannot be tested by chemical analysis except by the sort of chemical analysis which discloses, not the presence of any one impurity alone, but of all impurities. This is so clear that even the respondents' witnesses acted upon it. Dr. Sherman freely admitted that if called on to make a chemical analysis simply to determine—just as the tea examiners have to determine—which of two samples is the purer, he would necessarily make his analysis so complete as to disclose the whole chemical contents, including substantially all impurities (fols. 389-394). This question

put Dr. Sherman in precisely the position in which the statute places the examiners; and he answered it exactly as we contend that the statute required them to answer it. Accordingly, if the purpose is the determining factor, the court should hold that no process can be deemed a chemical analysis under the Tea Law unless it is calculated to disclose at least the presence of all kinds of matter which are not tea, and also to determine whether the quantity of such foreign matter is greater in one sample than in the other. Certainly Regulation 22 does not meet this requirement.

That the chemical analysis which Congress had in mind was an analysis intended to disclose, identify, and estimate the total quantity of, all the foreign matters present in the tea, is also indicated by the fact testified to by Dr. deGhuée, that at the time the Tea Law was passed there were in existence numerous works devoted to food examination which contained chapters or sections devoted to the chemical analysis of tea, all of which prescribed a general analysis of the tea by regular ordinary chemical processes, calculated to disclose and identify, not any single form of foreign matter, but all substances not normally present in the leaf itself. These books, abstracts of the substance of which were offered in evidence (Exhibit 2), tend to show that, at the date of the passage of the act, chemical analysis of tea was generally understood as a process intended to show the whole chemical contents of the substance and particularly all impurities.

In addition to all this, the method required by the present Regulation 22 determines the admissibility of the tea exclusively by the result of the Read Test in precisely the form in which it was held not to be a chemical analysis, and therefore illegal, by the Board of General Appraisers—

the appellants' own predecessors—in T. D. No. 32959 and T. D. 33087. At the time when the Board reached those decisions the regulation was identical with the present up to the point where the blue specks appear upon the test sheets. The regulation then stopped there, and did not contain the present provision requiring that the sheets be sent to the chemist for identification, and though about a dozen government chemists testified before the Board that they considered it a chemical analysis, the Board had no hesitation in holding that it was not a chemical but a mere mechanical analysis, since it called for no chemical process, method, reaction or result. This decision they reached, although the question was put to them in its bald form, simply as to whether or not the test was any kind of a chemical analysis at all, without reference to whether or not it had the only characteristic which could bring it within the Tea Law—that is to say, power to test the relative purity of import and standard. On the basis of Dr. deGhuée's testimony at that hearing, when he accepted, for the purposes of the discussion, the broadest possible definition of "chemical analysis" without reference to its usefulness as the test required by the statute, and stated that the method was not a chemical analysis mainly because it failed to identify any chemical substance, the General Appraisers suggested that the Read Test, if supplemented by some chemical process leading to the identification of the color disclosed, might be deemed a step in a chemical analysis. Thereupon the present regulations were promulgated, in which the examiners were directed to send the test sheets to the government chemists for identification of the color or facing material appearing thereon. It is respectfully submitted that this was the merest evasion and subter-

fuge. The regulation, as now framed, leaves the government chemist free to identify the color by any means he may choose, chemical or otherwise. He may merely look at it and guess its nature. Since no importance or effect whatever is given to his judgment we surmise that this is what he does. If so, the identification would not have the magical effect which counsel for the respondents attribute to it of turning the whole process into a chemical analysis even within the definition suggested by Dr. deGhée as the extremest possible (fol. 241). But whether or not any chemical process is carried out by the government chemist, the regulation neither requires it nor gives any effect to his work. When the color is identified the teas are to be rejected no matter whether the color turns out to be Prussian Blue, Indigo, Ultramarine or the rarest of aniline colors. Accordingly the result of an examination under regulation 22, as it now stands, is left to depend on exactly the same test as was condemned by the general appraisers. We respectfully submit that this is not an acceptance in good faith of the appraisers' suggestion and that the alteration in the form of mechanical analysis condemned by them does not convert it into a chemical analysis.

In this connection the language of the regulations is significant. Until 1913 the general paragraph of each of the annual regulations—for example, paragraph 11 of T. D. 27124, being the regulations for 1906—provided in the exact words of the Tea Law:

"The examination of tea by examiners or boards of United States General Appraisers under this Act shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water and, if necessary, chemical analysis."

With the adoption of T. D. 33211, the 1913 regulations, the latter part of this clause was changed so as to read (Regulation 11) :

"The examination . . . shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water and 'the Read method with additions and modifications for the detection of artificial coloring and facing' (see Regulation 22)."

There is no reference, in the regulation, to chemical analysis. The Treasury Department itself therefore recognizes a vivid distinction between chemical analysis and the present form of the "Read method with modifications". If even the department had really thought it a form of chemical analysis it would have been so described, or the earlier paragraph would not have been changed.

The construction which we have given the words "chemical analysis" is also reasonable when considered in connection with the practical administration of the law. As the learned trial judge pointed out, tests by sample of such a commodity as tea are usually erratic. The hardship to importers of being unable to determine beforehand whether or not their teas are going to be entitled to admission is great, at the best. Very delicate and sensitive tests to detect ultra-microscopic quantities of matter—quantities insufficient to produce any detrimental effect—are extremely ill-adapted to practical service, tend to work gross injustice, and are the ready instruments of fraudulent discrimination and preference. As a means of estimating the relative impurity of samples, chemical analysis of the ordinary sort is reasonably efficient. It is sufficiently sensitive to detect important impurities and to show their quantity. It is ordinarily not able to detect micro-

scopic quantities or to estimate their relative values. Accordingly a test of relative purity by the ordinarily understood method of chemical analysis produces a fair and reasonable result. Microscopic and harmless quantities of color or of any other impurity may escape, but the general purity of the two teas under examination can hardly fail to be fairly compared. On the other hand the Read test is substantially a microscopic process. Though it uses only a low power microscope, it previously separates and, by spreading or smearing them, to all intents and purposes greatly magnifies the particles sought for in the examination. The Read Test sheet shown by Dr. Acree (Exhibit C) made upon his teas colored with crystal violet (the particles of which he testified were so fine as to be invisible in a compound microscope) shows how large a smear on white paper such ultra-microscopic particles can make. The net result of the test is, therefore, the same as that of a microscopic examination. We cannot think that Congress intended, when it permitted the examination of teas by chemical analysis, to permit a purely microscopic examination, having no chemical characteristic, and using no chemical means or process; and on the other hand it is extremely probable that it did actually intend to reach just such a rough general result, in a comparison of the import with the standard, as would be reached by an ordinary chemical analysis looking for all foreign matter.

An additional means of ascertaining with what meaning Congress used the words may be found in examining the earlier Tea Law, the Act of March 2, 1883, Chap. 64 (22 Stat. 451), and the practice thereunder. That Act prescribed no method of examination, but the first Treasury

regulations issued under it provided that teas might be examined under the general regulations of 1874, in the manner prescribed thereby for examination of drugs, chemicals and medicines. This regulation called for a general chemical analysis of the ordinary type. It is submitted that in all probability the words "chemical analysis" were placed in the present Act with this practice in mind and were intended to call for a similar process.

The learned Assistant Attorney-General argues that though the statute prescribes an examination in accordance with the customs and usages of the tea trade, including if necessary chemical analysis, it does not forbid other modes of examination, and that therefore the board may use, for their information, any method they please. This argument is irrelevant. The statute does not merely say that the method in question shall be *used*, thus permitting, by failing to forbid other methods. It says that the comparative purity of standard and import "shall be *tested*" by that method. Obviously if the relative merits of two things are required to be tested by one method they cannot be tested by any other. If any other is used, and any weight given to the result, the comparison is not made in the required manner. If teas are passed or rejected on information derived from tests not in accordance with the customs of the tea trade, and not within the meaning of the term "chemical analysis", they are not tested in the sole authorized manner.

It is also argued that Congress cannot have meant to deprive the board of the benefit of modern improvements in methods of examination, or to confine it to the primitive cup test which when the

statute was enacted was, as it now is, the only method in accordance with the customs of the trade. There is, however, no inflexibility in the requirement. Though the trade customs have not in fact changed, they may and doubtless will as soon as science shall have developed a method practically superior to the "cup test". Any such new method, once become customary, will be within the act. But inflexible or not, the requirement is too reasonable to need construing out of its literal sense. To be fair to importers the test applied must be one which is in ordinary use, so that importers may ascertain, when teas are bought for import, whether they will be admissible or not.

It is further argued that the Read Test is a mere form of visual inspection, which is one of the methods of examination customary in the trade. It is an odd contention that the process may be at one and the same time a chemical analysis and a mere visual inspection; but if it were the latter the appellant would be no better off. The regulation prescribing the Read Test (Reg. 23) provides, "No consideration shall be given to the appearance or so called style of the dry leaf". The dry leaf is what the Read Test works upon. If it is a visual inspection of anything it is of the dry leaf. Since the appearance of the dry leaf is not to affect the result of the examination, visual inspection, however performed, cannot be deemed part of the prescribed method.

If the above reasoning is sound, the test prescribed by Regulation 22 is unauthorized by the Tea Law. If so, no one has a right to make the admission of the complainants' imports depend upon it, or to use it as the deciding test of comparative purity. The fact that its use will damage the com-

plainants by causing the rejection of their teas is apparent, not only from the testimony as to its action on such slight color as they contain, but because it has already rejected them at the port of entry. That they probably would not be rejected on a lawful examination appears from the testimony even of the respondents' witnesses that they contain less foreign matter than the standard. Every essential to show the right to an injunction against the use of this test was therefore proven.

#### **POINT IV.**

**The Circuit Court of Appeals correctly held that the application for injunctive relief was not premature.**

The appellants argue that an injunction should not issue in this case because the complainants have not exhausted the remedy given them by the statute—because, that is, they have not proceeded with their application for re-examination by the appellate board. This argument seems entirely to misapprehend the nature of our contentions. We are not seeking a review of an unfavorable action, nor are we testing the validity of an incomplete official act. We are seeking to enjoin the commission of threatened unlawful acts—the execution of official functions in an unauthorized manner. If, as we contend, the acts which the appellants intend to commit and are directed by the Department to commit are unlawful, we cannot be expected to bring about their commission before we go to court for relief. The illegality which we point

out entirely vitiates the alleged remedy given by the statute. In this matter of the exhaustion of remedies before asking equitable relief, as in other matters, the law does not require a vain thing (*Case v. Beauregard*, 101 U. S. 688). When the contention is that the administrative decision is absolutely unauthorized (and it makes no difference in this connection whether it is unauthorized because unconstitutional or because unsupported by statute, *Philadelphia Co. v. Stimson*, 223 U. S. 605), a court of equity may be resorted to at once without waiting for appeals provided by statute (*Bacon v. Rutland R. R. Co.*, 232 U. S. 134). Especially must this be true where, as here, the illegality complained of taints the action of the tribunal to which it is contended that resort should be had. If we were here seeking to review the actual examination made by the examiner at the port, and to show that he erred, or that his decision was corrupt, it would of course be proper for the court to withhold relief until the complainants had ascertained whether they could not secure it from the appellate authorities; but in our case the very thing complained of is a proposed illegal action by the the appellate body itself, in the application of the very remedy which they say that we have left unexhausted. The principle contended for is entirely inapplicable.

The learned trial judge, however, said in his opinion:

"If it is ever right to coerce or guide the decision of any tribunal . . . it must have a chance to do right before it is assumed to be about to do wrong. This action asserts error before it is committed, and for this reason alone I should refuse the injunction."

To this statement the answer seems plain. In the first place we do not seek to coerce or guide the decision of the appellants, except in so far as an ordinary judicial construction of the statute, such as that which we ask, will guide it. We do not ask the court to say to the board, "Find the tea admissible", but only "Use the judgment and discretion, which the Tea Law has clothed you with in finding out by a lawful test whether the tea contains more or less foreign matter than the standard tea, and not merely in ascertaining by an unauthorized test whether or not the tea contains color".

The proposition that a tribunal must have a chance to do right before it is assumed to be about to do wrong may be sound enough, but in the present case there is no assumption about it. It is not a mere assumption that the appellants are about to do the things complained of. They assert it. Indeed their counsel expressly conceded on the trial that the respondents fully intended upon a re-examination to reject the teas in question, irrespective of any other considerations, if, on Read-testing, they found color therein (fols. 237-8, 284). The learned Assistant Attorney-General argues that there was no such concession. On page 24 of his brief he asserts that the language quoted and relied on by the Circuit Court of Appeals as the concession was that of the complainants' counsel. In fact, it was a restatement by him of what he understood to be conceded. When he finished the trial Court asserted (fol. 80) that counsel for the government said the statement was correct. There was no denial of this assertion. If such a concession is not to be treated as conclusive no agreement of counsel as to the facts can ever be

relied on. Where the intention to do the thing sought to be restrained is open and avowed, the principle suggested by the learned trial judge can have no application. It is a principle of comity intended to spare the sensibilities of a co-ordinate authority, which the court can enjoin, and will enjoin if need be, but will refrain from enjoining so long as the practical need of an injunction is not apparent. It is properly invoked in cases where there is doubt whether the proposed injury will in fact be committed, as the court naturally wishes to avoid, if it can, using its power to coerce another governmental body. Where, however, as here, the intention is expressly avowed and the intended conduct is merely a continuation of the established practice of the body in question, the principle cannot possibly apply. The action will certainly be taken and the injury inflicted if the injunction is not issued. There is no hope for a change of heart.

The rule governing just such situations was clearly expressed by the Supreme Court of the United States in *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65. In that case the complainants had a contract with the respondent City which gave them the exclusive right to maintain waterworks. The City, having obtained legislation authorizing it to build a competing waterworks, asserted, by resolution, that it denied the binding effect of the contract, and then proceeded to hold an election to authorize a bond issue for its new works. The Waterworks Company sued for an injunction, and was met with the contention here advanced—that its application was premature because the City had not yet impaired the obligation of the contract, and should not be assumed to be about to do so. Brushing aside this contention, and holding that the

injunction should have been granted, the Supreme Court said (at p. 82) :

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties, in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

The principle thus stated is doubly applicable to the present case because the conduct sought to be restrained is commanded by Treasury regulations which are explicitly directed to all examiners, thus including the appellants, and which, if valid, govern their actions.

To this contention the appellants and the learned trial judge answer, in substance, that Treasury regulations on the subject are not binding on the appellants, who, if they see fit, may reject teas merely for color, but are not obliged to do so. This answer, however, neglects the vital facts of the matter, which are that both the Treasury Department and the appellants evidently believe that the regulations are binding on the appellants; that the appellants intend to act in any event as if the regulations were

binding; and that the consequent injury to the complainants is thus unavoidable unless the injunction issue. Moreover, it is well settled that persons affected by such regulations have a right to assume that they will be acted on, and are not required to do anything so futile as to give the administrative officers an opportunity to disobey them. (*U. S. v. Lee*, 106 U. S. 196.)

The exact contention adopted by Judge Hough in this branch of his opinion was considered and condemned by the court in *Louisville & Nashville Co. v. R. R. Commission*, 157 Fed. 944. In that case, in support of the complainant's prayer for an injunction, it was shown that the conduct sought to be enjoined was commanded by certain orders of the governor. In their answering argument, the respondents insisted that they were not bound by the directions of the governor and that it should not therefore be assumed that they would commit the acts directed. The court specifically held that it made no difference whether or not the orders were binding but that under the pleadings, which very closely resembled those in the case at bar, the probability that the defendants would commit the alleged acts was sufficiently shown. The injunction accordingly issued. The passage of the opinion relating to this subject on pages 960-961 of the report is too long for quotation, but applies perfectly, and much of it reads as if written in the case at bar.

On the other hand, if relief is not sought now, it can hardly be sought at all. The decisions of the tea board are unappealable and cannot be reviewed by any court. If then, they make their decision on the theory which they say they intend to apply and by means of the Read method, the

damage will be irreparable. Their proceedings are secret. No one can show the grounds of this decision, or whether they in fact acted on the erroneous construction of the law. The only way in which such damage can be avoided is by action of the character herein sought. Under such circumstances the prayer for an injunction cannot be premature. To say that it is premature is to tell the complainants, not that they should have moved the court for relief at some later date, but that they should never move it at all. It is a total denial of relief.

Again, the application for an injunction against the use of the Read test is certainly not premature, even if the time for the other relief asked has not yet come. As to the method of examination which is to be used, the regulations of the Treasury Department are clearly binding (so far as they do not conflict with the statute) on all examiners, appellate as well as original. The details of carrying out the method of examination prescribed by the act are typical examples of the matters connected with the enforcement of the law which it was the purpose of the statute to commit to the authority of the Secretary of the Treasury. The test prescribed by him is either within the statute or it is not. If it is within the statute, the appellants must decide the admissibility of the teas by it. If it is not, they have no right to do so. They have no discretion about it. There is no pretence that they do not believe the regulation requiring the use of the Read test to be lawful, or that they do not intend to obey it. Not even Judge Hough, we venture to state, would suggest that the appellants would have the right to disregard the Treasury Department's direction

to use the Read test, unless that test is unauthorized by the statute, in which case they would have no right to use it at all, whether directed or not. From all this it follows with practical certainty, that the appellants, if unrestrained, will use the Read test. If, therefore, it is—as we maintain—unlawful, the application to restrain them by injunction can hardly be premature, even if the application to restrain the appellants from rejecting teas for color only cannot yet be made. As to the test, there is no room for the contention that the appellants are free to act, and may not do as they threaten. They must do so, if they may.

#### **POINT V.**

##### **The absence of any adequate remedy at law was demonstrated.**

The Government's contention that no irreparable damage was shown and that the complainants had an adequate remedy at law is an afterthought, seriously presented for the first time in this Court. The question, though formally raised by the answer, was not actually litigated, either in the Trial Court or in the Circuit Court of Appeals.

In the first place, so far from there being any adequate remedy at law, there was no remedy at law whatever. This is a case in which equity offered the sole means of obtaining justice. It is perfectly well settled that the decision of the appellants upon the question of fact committed to them by the tea law is final. If, therefore, the complainants had waited until the teas were examined and

rejected, and had then brought an action at law to recover for the loss, they would instantly have been met with the contention that the inadmissibility of the teas was *res adjudicata* against them. If they should allege that the appellants had adopted and applied an incorrect construction of the law and rejected the teas on an unauthorized ground, they would be met by an insuperable difficulty in proof. The proceedings of the Board are not public; its conclusions are not reduced to judicial form, and any court considering one of those decisions would be obliged to assume that such decision was based at least in part upon conclusions of fact which the Board had a right to make.

Again, if an action at law should be brought against the appellants for damages resulting from an unauthorized rejection of the teas they would instantly contend that a quasi-judicial officer is not liable for an erroneous decision, though based on a false construction of a Federal statute (*Williams v. Weaver*, 100 U. S. 547). Having jurisdiction to decide the fate of the teas, their adoption of an unlawful ground of exclusion might well be deemed mere error, and thus no possible basis of legal liability. If not enjoined they can thus exclude the teas on a ground utterly unjustified by the law and then take refuge behind the rule granting immunity to public officers for mistakes.

All this, however, does not touch the real injury to the complainants. The latter are very large importers of tea. The question as to how the tea law is to be construed in the particulars here under consideration is obviously vital to their entire business. If every consignment of tea which they import is to be subjected to the hazard of rejection

for color or to that of the use of the Read test, the speculative element of the business is colossally increased and the inevitable losses, due to rejections, will be large and entirely incalculable. No proof was made of the details of these facts and none was necessary. The Court cannot help seeing that the practise of rejecting on an authorized ground would subject any large importer of tea to serious losses which could not possibly be estimated beforehand. Moreover the business credit and good name of the complainants are seriously injured by any and every unauthorized rejection. In proof of this it is perhaps sufficient to refer to the insinuations and inuendos of the Answer (for example at fol. 67) suggesting darkly that the complainants had made a practice of buying, on speculation, in the hope of somehow working them into the United States, teas which had been rejected by other buyers and were known to be colored. It hardly needs argument to show that persons who arrange for the importation of teas through dealers and customers whose deliveries are delayed by rejections are rendered by each rejection less likely to repeat their orders. It is true, as the appellants argue, that all tea merchants are in the same boat. This, however, does not affect the fact that every rejection does damage to the business and good will of the merchant whose importation is excluded. The fact that other merchants are subjected to similar disadvantages does not lessen the damage, and if the rejection is unauthorized it is a clear wrong and a proper basis for relief.

It must be remembered that the remedy at law which is to defeat equity jurisdiction must be *as* complete, *as* practical, and *as* efficient to the ends of justice and its prompt administration as the remedy

in equity (*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1). Difficulty of proof seems to be an element to be considered in comparing the adequacy of the remedies (*Kilbourn v. Sunderland*, 130 U. S. 505). Clearly, here, the proof in an action at law would be vastly more difficult than in a suit in equity. We have for our equity suit the appellants' own concession as to their intentions: but for the action at law we should have to prove the operations of the appellants' minds—the fact that their decision was based on unauthorized, rather than authorized grounds.

Finally, as hereinbefore suggested, the concession of counsel for the Government at the trial was perhaps broad enough to cover the ground. Mr. Wemple, in admitting (fol. 112) that the damages referred to in Paragraph Sixteen of the complaint will exceed the sum of \$3,000, necessarily admitted the existence of some at least of the damages therein referred to. These were the particular injuries specified by paragraphs Thirteen, Fourteen and Fifteen of the complaint. They include the rejection of other teas, the loss of contracts and of custom by reason of illegal rejections and the injury to the business credit and good name of the complainants, all of which are alleged to be and obviously are difficult, if not impossible of computation. Though the concession only admits that these damages would exceed a given amount, it must be an admission that they existed; and if they existed at all they are obviously sufficiently difficult to compute to form a sound basis for equitable jurisdiction.

The case of *Cruickshank v. Bidwell*, 176 U. S. 73, relied on by the appellants as authority for the proposition that no equitable relief can be had in

such a case because there is an adequate remedy at law, is not in point. There the sole ground of complaint was the alleged unconstitutionality of the Tea Law. If that law had been unconstitutional the complainants would have a clear right of action at law, easy to enforce, against the collector for the value of teas destroyed under the act. No other damage than the loss of the teas in question was shown or could be inferred from the evidence. Moreover this court was evidently then inclined to hold that equitable relief could not be granted in advance against the action of administrative officers of the government in any, except perhaps the most extreme, case. The opinion cites (p. 80), as the only precedent, *Noble v. Union Co.*, 147 U. S. 165, where it says the Government raised no question as to the equity jurisdiction, which offered the only possible remedy. It then proceeds: "We are unwilling to extend that precedent." Since then, however, the court has exercised the jurisdiction freely, as in *American School of Magnetic Healing v. McAnnulty, supra*, and *Philadelphia Co. v. Stimson, supra*. In the most recent instance the jurisdiction was sustained against the Secretary of the Interior, the chief specific ground of equitable relief being that the complainant had much property, other than that in suit, as to which the same question would arise. *Santa Fe Co. v. Lane*, 244 U. S. 492. The same ground exists in the case at bar. The complainants are large importers of teas. Every consignment they import will raise the questions litigated here. No proof other than this single fact is necessary to show that the interposition of equity was required if only in order to prevent a multiplicity of suits.

**POINT VI.****The decision appealed from should be affirmed.**

The importance of the question offered for decision in this action is very great. Under the present conditions the complainants, employing the utmost care of which mankind is capable, Read-testing every sample before purchase, refusing absolutely to buy any teas which on Read-testing show any color, are utterly unable to determine whether or not the teas purchased by them can be brought in. Time and again teas of the highest quality, inestimably superior to the standard, are rejected while infinitely inferior teas known to contain color, imported by their competitors, pass the test and are allowed to enter. There is no relief and no redress. It is practically impossible for a buyer to examine more than a few samples of any line purchased. The preparation of a Read test sheet takes but a short time, but its examination under the magnifying glass required by the regulations obviously requires very long and careful scrutiny—sometimes hours. When the tea is very free from color, every one of the innumerable markings on the paper must be examined before the examiner can be sure that none of the microscopic specks are blue. If a single test would accurately show the characteristics of the samples examined, so that, allowing for that lack of uniformity which will always be apparent in samples, some inference might safely be drawn as to the nature of the whole consignment, the test would be barely practicable; but with the gross uncertainty of its action, protection could not be

secured if the importer were to put through the Read test sieve a tenth part of the entire tea purchased by him. The regulations themselves recognize the uncertainty. Regulation 22 provides for the repetition of the test after it is first made. If on a repetition results inferior to standards appear, no less than 5 per cent. of the line is to be sampled and Read-tested and results of those tests are to be compared. This shows very clearly that the results of the tests upon the same tea vary widely. This again is shown by the frequency of the reversals by the general appraisers who, applying the same tests as the examiners at the ports, have in very many cases reversed their rulings. The net result of the entire method as now practiced is to reduce the tea business to a mere speculation.

And there is no reason for the adoption of any such method. There is hardly a pretense that the color for which tea is excluded is objectionable in any sense. It is certainly harmless and it now occurs in quantities too small to affect even the appearance of the tea. Such quantities of course as were dealt with in the testimony in this case could not possibly be condemned under the Pure Food Law (*U. S. v. Lexington Mill Co.*, 232 U. S. 399). That statute would seem to indicate the true public policy of the country in regard to such matters and to show that other statutes which may tend incidentally to give the public the same sort of protection should not be widened by construction so as to make them go further than the Pure Food Law itself goes. These complainants hold no brief for colored tea or for any impure product. They have done their best to conform to the law and to the regulations as now framed, but they have suffered

enormous losses from the uncertainty of the existing test. This has placed their business upon a speculative basis which they have always hitherto avoided. They are contending only against what they believe to be an unlawful assumption of power by the executive authorities and the creation of a system of examination which not only tends to shut out the best and purest teas and let in teas less fit for consumption, but also offers the most direct opportunities for oppressive and corrupt discriminations, of which they believe that they and certain other importers have been the victims. They do not desire to import and do not willingly import a single pound of impure or otherwise objectionable tea, but they believe that Congress never intended to permit the Department to disregard important impurities, or to determine vast property rights in accordance with the result of a haphazard test used to determine the presence or absence of microscopic quantities of harmless matter.

Respectfully submitted,

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